

CONCENTRATION AS A FACTOR IN ANTIMERGER LITIGATION†

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Using the recent VON'S GROCERY case as a background, the authors expand their discussion into an analysis of the irrelevancy of concentration in an industry in evolving a valid test of the legality of a merger within that industry. They effectively criticize the reasoning in the leading case by carrying it to its logical, though absurd, result. The discussion goes on to illustrate that such reasoning becomes faulty when it begins to look not only to the portion of the market which is controlled by the parties desiring to merge, but also to the general degree of concentration in the industry, the amount of the market controlled by an arbitrarily chosen number of large competitors in the industry, the trend toward or away from merger generally within the industry, and the fact that such industry became concentrated through earlier mergers. Finally, the authors show that while existence of concentration is a strike against the legality of a merger, lack of such concentration does not favor the validity of a merger.

I. THE PROBLEM

Several of the statutes commonly known as the antitrust laws may reach corporate mergers and acquisitions. Prominent among them are section 1 of the Sherman Act and section 7 of the Clayton Act. Responding to real or imagined demands of the Congress, the United States Supreme Court in recent years has applied antimerger legislation with dramatic vigor. To the amazement of the practicing bar, acquisitions have been forbidden even though there was no competition between the acquired and acquiring firm. Thus mergers between firms vertically related as supplier and customer have been deemed illegal.¹ In other instances acquisitions have been stricken down even when the parties enjoyed no such relationship and did not compete in any manner.²

† For a different aspect of the problem of concentration consult Finkelstein & Friedberg, "The Application of an Entropy Theory of Concentration to the Clayton Act," 76 Yale L. J. 677 (1967).

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¹ United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957).

² FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).

Illegality has been found when the merger might merely impair potential as opposed to actual competition.³ Similar results have flowed from a finding that joinder of the parties might result in practices of a questionable character. Thus we learned that a merger whereby a resulting firm might practice reciprocity would be deemed unlawful even though reciprocity itself had theretofore been deemed legal.⁴

Exemptions from antitrust coverage have diminished under repeated attacks by the Attorney General. A pipeline whose acquisition had been approved by the FPC found that its conduct was still subject to review under the terms of section 7 of the Clayton Act.⁵ An enterprise which could not meet its obligations as they became due could not qualify as a "failing firm" and hence be acquired by a competitor. By implication, only bankruptcy and the auction block sufficed to support that exemption.⁶ Finally, the United States Supreme Court has thrown grave doubts on the well-established doctrine that a merger will be held unlawful only if it substantially impairs competition within a defined geographic area.⁷

Against a shower of such precedents, many lawyers have thrown up their hands in despair. They do not believe that there is such a thing as a merger which will pass muster with the courts. If this belief is correct, it follows that there is no reason to examine the criteria previously developed for testing the validity of a merger. In the hope that such a view is unduly defeatist in character, we approach the topic of concentration. The fact of concentration in an industry is frequently given as a reason for invalidating a merger. Hence we inquire into the nature of concentration and analyze its application to the preservation of a competitive system.

II. CHOOSING THE RIGHT NUMBER

The test of concentration varies a good deal from case to case. Thus in some instances concentration will be found because the two largest firms in the industry are thought to enjoy an undue share of the market. In litigation involving the plumbing industry, for example, an acquisition by Crane was found unlawful because after the merger Crane and American Radiator combined, the two largest firms, would

³ Hale & Hale, "Potential Competition Under Section 7: The Supreme Court's Crystal Ball," 1964 S. Ct. Rev. 171.

⁴ *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965).

⁵ *California v. FPC*, 369 U.S. 482 (1962).

⁶ Hale & Hale, "Failing Firms and the Merger Provisions of the Antitrust Laws," 52 Ky. L. J. 597 (1964).

⁷ *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966).

make two-thirds of the sales in the industry.⁸ In other cases the three largest firms have been used to test the existence of concentration.⁹ Indeed few numbers have been overlooked. Thus courts have also referred to the four, five, six, ten, twelve and twenty largest enterprises.¹⁰ Customarily, however, the test has been the combined market shares of the largest firms; that is, regardless of whether the number of firms to be taken is two, four, or more, it has always been a question of whether the combined market shares of those firms was deemed objectionably large.

Concentration is only an ancillary factor in determining the legality of a merger. Central to the resolution of the legal issue is the extent to which the acquiring firm's market share will be augmented by the acquisition. Thus if a firm already enjoys some fifteen percent of its industry (however defined), adding another five per cent by merger may be found unlawful. In reaching that conclusion the existence of concentration is merely an additional factor to be considered.¹¹

III. THE NEW DEFINITION OF CONCENTRATION

Into this well established routine of Big Two's, Big Three's, and the like, there has suddenly emerged a new concept of concentration.

⁸ *Crane Co. v. Briggs Mfg. Co.*, 280 F.2d 747 (6th Cir.), *aff'g per curiam*, 185 F. Supp. 177 (E.D. Mich. 1960); *Inland Container Corp.*, Trade Reg. Rep. ¶ 17,012, at 22, 120 (1964); *Pillsbury Mills, Inc.*, 57 F.T.C. 1274, 1406 (1960). In *United States v. Pabst Brewing Co.*, 384 U.S. 546, 551 (1966) it was said:

These facts show a very marked thirty-year decline in the number of brewers and a sharp rise in recent years in the percentage share of the market controlled by the leading brewers. If not stopped, this decline in the number of separate competitors and this rise in the share of the market controlled by the larger beer manufacturers are bound to lead to greater and greater concentration of the beer industry into fewer and fewer hands.

⁹ *Crown Zellerbach Corp.*, 54 F.T.C. 768, 792 (1957), *aff'd.*, 296 F.2d 800 (9th Cir. 1961).

¹⁰ *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *Brown Shoe Co. v. United States*, 370 U.S. 294, 300 (1962) (referring to the market share of the twenty-four largest manufacturers); *Procter & Gamble Co. v. FTC*, 358 F.2d 74 (6th Cir. 1966); *A. G. Spalding & Bros., Inc. v. FTC*, 301 F.2d 585, 612, 628 (3d Cir. 1962); *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738 (2d Cir. 1953); *United States v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867, 941 (S.D.N.Y. 1965); *United States v. Chrysler Corp.*, 232 F. Supp. 651, 656 (D.N.J. 1964); *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 584 (S.D.N.Y. 1958); *Foremost Dairies, Inc.*, 60 F.T.C. 944 (1962). See B. Bock, *Mergers and Markets: An Economic Analysis of Case Law at 61-63* (1960); *The (National Industrial) Conference Board: Studies in Business and Economics* (No. 69, 1960).

¹¹ *But cf. United States v. Continental Can Co.*, 378 U.S. 441, 458 (1964).

In *United States v. Von's Grocery Co.*,¹² the trial court adhered to the usual concepts of concentration set forth above. It noted, for example, that the market shares of the Big Twenty grocery chains in the Los Angeles area had increased from 43.8 percent to 56.9 percent of the market between 1948 and 1958.¹³ Despite that increase, the small market shares of all the grocers, and particularly those of the merging parties, together with other factors such as ease of entry, convinced the trial court that the acquisition would not have anti-competitive effects. The merger was found not to have resulted in an increase in concentration in the retail grocery business. For making that finding, the district court was rebuked. The conclusion that there had been no increase in concentration was said by the Supreme Court to be

completely contradicted by . . . the steady decline in the number of individual grocery store owners It is thus apparent that the district court . . . used the term 'concentration' in some sense other than a total decrease in the number of separate competitors, which is the crucial point here.¹⁴

Those views were amplified in other portions of the Supreme Court's opinion. For one, the Court considered the "rapid decline in the number of grocery store owners."¹⁵ It also mentioned a "continuous trend toward fewer and fewer owner-competitors." Furthermore, the opinion contained a reference to a "continuous decline in the number of small businesses."¹⁶ Note the addition of the word "small," which had not previously appeared in a consideration of the existence of concentration. The Supreme Court was obviously concerned not with market shares or the absolute number of competitors, but with the number of a particular type of competitor, namely the owner-operator of a single grocery. Thus it spoke of an increase in the number of chains with two or more stores and a decline in the number of single store owners.¹⁷ This language suggests that it is necessary to characterize

¹² 384 U.S. 270 (1966).

¹³ *Id.*

¹⁴ *Id.* at 273 n.3.

¹⁵ *Id.* at 277.

¹⁶ *Id.* at 278.

¹⁷ *Id.* at 273. *Cf.* *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966) wherein the Court noted the decline in the total number of breweries (not brewing firms) from 714 to 229 as indicating that the merger was unlawful. Here again emphasis is placed on the individual productive plant, but, unlike the opinion in *Von's Grocery*, nothing is said about a decline in single brewery firms.

members of an industry by reference to their type of ownership in order to determine whether concentration exists.

For example, assume that a thousand competitors deal in a certain product and geographical market. Even if each competitor were of identical size and thus none enjoying more than one tenth of one percent of the market, the Court's new test would permit a finding of concentration if each of the competitors operated more than one retail outlet. This is a wholly different concept of concentration than that which appeared in the earlier cases. It does not follow the economic doctrines which underlie the assumptions made in the older cases. From an economic point of view the character of the ownership (multistore as opposed to single store) is irrelevant. Ownership has no more bearing on the competitive nature of the market than would the determination that too many groceries were owned or operated by whites or nonwhites.¹⁸

Throughout the opinion it is apparent that the court thought it was somehow preserving a form of enterprise from the onslaught of rapacious buccaneers. As the dissent points out, the majority opinion is redolent with the nostalgia of an earlier day. Presumably, an attempt is made to restore economic conditions of more than a generation back. Thus in the dissenting opinion it was said:

Section 7 was never intended by Congress for use by the Court as a charter to roll back the supermarket revolution. Yet the Court's opinion is hardly more than a requiem for the so-called 'Mom and Pop' grocery stores—the bakery and butcher shops, the vegetable and fish markets—that are now economically and technologically obsolete in many parts of the country. No action by this Court

¹⁸ The dissenting opinion in *Von's Grocery*, using conventional tests of concentration, found the market to be unthreatened. Thus it was said:

... In any meaningful sense, the structure of the Los Angeles grocery market remains unthreatened by concentration. Local competition is vigorous to a fault, not only among chain stores themselves but also between chain stores and single-store operators. The continuing population explosion of the Los Angeles area, which has outrun the expansion plans of even the largest chains, offers a surfeit of business opportunity for stores of all sizes. Affiliated with cooperatives that give the smallest store the buying strength of its largest competitor, new stores have taken full advantage of the remarkable ease of entry into the market.

United States v. *Von's Grocery Co.*, 384 U.S. 270, 287-88 (1966). The dissenting opinion went on to point out the lack of substantial barriers to entry into the industry. *Id.* at 300. The merit of the concept may be tested by putting the problem in reverse. Suppose Ford and General Motors proposed to merge. Would it be relevant that there had been an increase in the number of automobile factories?

can resurrect the old single-line Los Angeles food stores that have been run over by the automobile or obliterated by the freeway.¹⁹

However this may be, the merger in question did not terminate the separate ownership of a single-store grocery. Both parties to the merger owned multiple stores, together operating some sixty-six retail outlets. The only way in which a ban on the merger could possibly assist in the preservation of the "Mom-Pop" stores would be the hope that somehow it might blunt the competition offered by all chain and supermarket operations. It is doubtful that such a result could flow from the mere banning of a merger between two chain stores.²⁰

Another interesting question is whether the new definition of concentration expounded in the *Von's Grocery* case will be applied in antimerger litigation generally. In many industries, factors of indivisibility make it inconceivable that there could be "owner-operated" enterprises to protect. There are, for example, no "Mom-Pop" refineries in the petroleum industry. If the new definition cannot be applied, are the courts to return to the older test of concentration outlined above? Are the two tests to continue as alternative methods of attacking mergers? Or does the newly propounded test supplant the old one? In the latter case, as suggested above, it would be difficult to take concentration into account in industries where economies of scale render it impossible for small enterprises to exist.²¹

¹⁹ *Id.* at 288.

²⁰ Additional factors in the *Von's Grocery* case are of interest. In some degree the Court relied on the fact that other mergers had taken place after the questioned acquisition. *Id.* at 273. Oddly enough, however, those other mergers were not linked to any change in concentration ratios but the continuance of numerous mergers was said alone to constitute a violation of § 7 of the Clayton Act. Thus other mergers between firms after the questioned acquisition can render the questioned merger unlawful. More orthodox stress was laid on the fact that the acquisition in question would move the defendant up to the number two position in the market. *Id.* Attention is also invited to the fact that the opinion stressed the prior success in growth of the participants to the merger. Perhaps that can be said to suggest awareness that blocking a merger may impede growth. Attention is further invited to the reliance on post-acquisition evidence found important in *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965).

Most striking is the implication that under the ordinary test concentration would have been deemed acceptable. Also that the market shares of the parties, totaling some 7.5% according to the reviewing court, were not sufficiently high, apart from other factors, to hold the merger unlawful. Such an implication appears to be inconsistent with the position taken in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), and *United States v. Aluminum Co. of Am.*, 377 U.S. 271 (1964).

²¹ Perhaps it is worth noting that in the more recent case of *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), the concept of concentration seems to have swung back to its pre-*Von's Grocery* form, although mention was made of a decline in the number of breweries, as opposed to the number of brewers.

IV. CRITIQUE OF THE NOTION OF CONCENTRATION

Prior to the *Von's Grocery* case concentration was found when the Big Two, Big Three, and the like, had combined market shares which exceeded a figure thought acceptable. Let us examine the rationality of such a test.

We start our examination with the method used to choose the number of firms whose market shares are to be considered. How is it that in one case the court looks to the Big Two and in another case to the Big Twelve? Among economists a frequent measure of concentration is found in the combined market share of the Big Four in an industry, but no one has ever suggested a reason why it is more logical to pick four or five rather than three. The choice of the number can, of course, make a great difference in the outcome. An industry in which the two largest firms do two-thirds of the business is certainly a great deal more concentrated than one in which the Big Twelve enjoy that volume of the market. This fact gives rise to the suspicion that the number has been chosen with a view to the conclusion which the court wishes to reach. This is particularly disturbing when industrial usage has traditionally referred to one number and the court uses a higher one. In the manufacture of automobiles, for example, it has been common to refer to the Big Three. If a court were to choose some number other than that which has been used in the trade, a question would naturally arise as to how that other number was chosen. The question becomes even more vivid when the number is enlarged with the effect of including one of the parties to the merger in the Big X. Take, for example, an industry of ten firms, three of which are recognized as the Big Three. Firms four and nine propose to merge. If the court then starts talking about the market share of the Big Four, one may suspect that the choice was arbitrary, just as one would find a reference to the Big Two difficult to sustain.

Despite the foregoing considerations there is little articulation in opinions as to the rationale of choosing the number of firms to be used in the test of concentration. Rarely does one find any discussion of contemporary trade usage. Some courts have resorted to counting the total number of firms in the industry, thus avoiding the arbitrary choice of a smaller number.²² This alternative, however, fails to indicate size relationship among industry members, which may be a significant factor in an industry which has a few members much larger than all the others. Therefore, a more valid test of concentration can be established by setting the number at less than the industry total, provided

²² *United States v. Standard Oil Co.*, 253 F. Supp. 196 (D.N.J. 1966).

such choice is made in consonance with current understanding and with avoidance of other difficulties.

A. *Relationship to Market Shares*

Assuming that a test has been devised with reference to trade usage in determining the Big X, and further that concentration relates to combined market shares of selected firms rather than the qualitative change in the character of an industry member as discussed in *Von's Grocery*, the next question is whether the concentration so frequently referred to in the opinions is something other than the combined market shares.

Clearly, the market share of parties to a merger constitutes the prime test of legality. Thus, if Bethlehem proposes to acquire Youngstown and the result is an increase in Bethlehem's market share from fifteen to twenty percent, the resulting industrial structure may be found objectionable. On that basis alone, the merger may be illegal. If the merger is prohibited, the courts are likely to refer to the existence of concentration in the industry. Thus in a case involving the proposed absorption of Mack Trucks by Chrysler Corporation the court gave as a reason for enjoining the merger the fact that the "Big Four" already sold from eighty-three to ninety percent of all trucks made in the United States and that such concentration had increased in the period from 1950 to 1963.²³ Whether concentration alone may constitute a test for legality is discussed in the cases only to the extent that the type of concentration involved in *Von's Grocery* presented the Court with the repugnance of a merger.²⁴

Such considerations lead to the question of whether concentration should be an independent test of the validity of a merger. In other words, if the combined market share of the merging parties is not objectionable, should the existence of concentration be a ground for the application of section 7 of the Clayton Act? Here a first consideration

²³ *United States v. Chrysler Corp.*, 232 F. Supp. 651, 656 (D.N.J. 1964). *Cf. United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 587, 604 (S.D.N.Y. 1958).

²⁴ *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966). A contrary view, with respect to the older type of concentration, is expressed in Hall & Phillips, "Antimerger Criteria: Power, Concentration, Foreclosure and Size," 9 Vill. L. Rev. 211, 218 (1964). Professor Bok suggested that an acquisition by someone other than a leading firm in an industry should be unlawful if it caused an increase in concentration. Bok, "Section 7 of the Clayton Act and the Merging of Law and Economics," 74 Harv. L. Rev. 226, 313 (1960). Professor Bok's test, however, appears to focus on market shares rather than concentration in general.

Some language suggesting the result implied in the text, however, will be found in *Marine Corp. v. Board of Governors*, 325 F.2d 960, 969 (7th Cir. 1963). *Cf. Farm Journal, Inc.*, 53 F.T.C. 26, 44 (1956).

is whether one of the parties to the merger is a member of the Big X. If so, reference to concentration is scarcely required. Obviously, a company in the Big X group will have a relatively large market share. Assuming that Bethlehem already had fifteen percent of the market for steel, it is perhaps fair to say, without more, that any substantial addition thereto should be illegal. If Bethlehem was among the Big X of the steel industry, the combined market share of those X, aside from that part held by Bethlehem, might be without significance. Here again we come back to the question of whether it is permissible to enlarge the number so as to include one of the merging parties in the Big X. If Bethlehem had been the seventh largest producer would it have been proper to include it in a Big Seven?

We have already discussed the problem of properly defining the number of firms in the Big X. The question now is whether concentration, apart from market shares, is a factor which should be considered in mergers. Varying the absolute number of firms in the industry illustrates this problem. Take an industry with one hundred firms of equal size. Here each firm would have one percent of the market; any merger between two would result in a combined two percent. Obviously there is no concentration by any standard we have known before. Hence, that factor should not be taken into account. On the other hand, if the size of the one hundred firms is not evenly distributed and the four largest have ninety percent of the market, a merger of numbers forty-five and seventy-two with the resulting market share of two-tenths of one percent seems to create little problem of either concentration or excessive market shares. The only question it does raise is that of countervailing power. We can increase the percentages without changing the result. Take an industry of one hundred firms in which the Big Five enjoy an aggregate fifty percent of the market. Number six, with five percent of the market, wants to acquire number eight, with three percent. If that transaction is permitted to stand, the Big Six will enjoy fifty-eight percent of the market. We are not aware of any calculus whereby it can be shown that it is better or worse for five firms to hold fifty percent than for six to hold fifty-eight percent. The important, controlling fact is that number six's market share will rise from five to eight percent.

Consider now a ten firm industry. In such an industry, if firm size is evenly distributed with each firm having a ten percent market share, any merger will appreciably increase the combined market share of the merging parties. On the other hand, if the Big Four in such a ten firm industry enjoy ninety percent of the market it is entirely possible that a merger of numbers five and nine, for example, with a

combined market share of only 1.5 percent, will again raise no issue, except possibly that the merger should be encouraged on the grounds of countervailing power. One can imagine cases in which "umbrella-holding" seems an active possibility. In an industry of ten firms, for example, if the Big Two enjoy eighty percent of the market, the smaller enterprises may well be dominated by the larger. Suppose that number three, with five percent of the market, proposed to acquire number seven, with three percent. If that transaction were permitted, one could thereafter say that the Big Three held eighty-eight percent of the market. We are unable to perceive that such a change is necessarily for the worse. Furthermore, using the Big Three as the appropriate number for testing concentration may well be arbitrary. Why not stop at two, or jump to four? On the other hand, wholly apart from the large aggregate market share of the Big Two or Three, one might well conclude that adding three to five percent by acquisition should be deemed unlawful.

There is this difference, however, between the one hundred firm industry and the ten firm industry: there are more decision-making units in the multifirm industry and, even though market shares may be similarly distributed, the absolute number of competitors may be important for some purposes. Nothing therein, however, suggests that concentration alone and apart from the market shares of the parties to the merger is relevant. If concentration is already high and the merger does not add to it (*i.e.* neither of the parties to the merger is in the Big X), then all one can say is that possibly the merger should be encouraged on the grounds of countervailing power.²⁵

B. *Origins of Concentration*

Assuming nevertheless that concentration is to be given weight in merger litigation apart from the measurement of market shares, a question arises as to whether the origin of such concentration is rele-

²⁵ The contrary view is expressed in *United States v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867 (S.D.N.Y. 1965), wherein the court said at 930:

A merger between firms occupying the same markets is known as a horizontal merger. Necessarily, such a merger combines the shares of the constituent parties and eliminates one firm from the market. It thereby automatically creates a firm with an increased share and increases concentration of the number of firms in the market.

It is submitted that the foregoing views reflect a failure to distinguish between an increase in market shares and the existence of concentration.

With respect to the illustration in the text it should be noted that in an industry wherein firms are numerous entry is not likely to be difficult and hence no degree of concentration is dangerous.

vant. In some cases courts have thought it significant that concentration existed and had arisen through mergers in the industry.²⁶ In other instances concentration arising from causes other than merger seems to have been equally damaging.²⁷ Whatever doubts may have existed on the subject were recently eradicated by the Supreme Court. In *United States v. Pabst Brewing Co.*²⁸ that tribunal explicitly stated:

We have not overlooked Pabst's contention that we should not consider the steady trend toward concentration in the beer industry because the Government has not shown that the trend is due to mergers. There is no duty on the Government to make such proof. It would seem fantastic to assume that part of the concentration in the beer industry has not been due to mergers but even if the Government made no such proof, it would not aid Pabst. Congress, in passing § 7 and in amending it with the Celler-Kefauver Anti-Merger amendment, was concerned with arresting concentration in the American economy, whatever its cause, in its incipency. . . . We hold that a trend toward concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anticompetitive effect of a merger may be.²⁹

Existence of concentration may reflect either factors of indivisibility or prior attempts to gain market power. The latter explanation, of course, is more likely if the concentration has resulted from merger activity. In the absence of a showing that concentration has resulted from earlier acquisitions, the court may be flying in the face of forces which it cannot control. In a typical industry the number of manufacturers is likely to grow rapidly as the popularity of the product increases. In 1946, for example, there were twenty-eight manufacturers of television sets. By 1951, the number had risen to one hundred. At that point, however, economies of scale were felt in the industry and by 1959, the number of manufacturers had fallen to thirty-seven.³⁰ In such circumstances prevention of a merger may simply deny the parties an opportunity to meet the lower costs of their competitors and hence impair rather than promote competition.

²⁶ *United States v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867, 941, 948 (S.D.N.Y. 1965); *Foremost Dairies, Inc.*, 60 F.T.C. 944 (1962).

²⁷ *United States v. Chrysler Corp.*, 232 F. Supp. 651, 656 (D.N.J. 1964); *United States v. Jos. Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal. 1966). A contrary view was expressed in *United States v. Pabst Brewing Co.*, 233 F. Supp. 475, 493 (E.D. Wis. 1964), *rev'd*, 384 U.S. 546 (1966). *Accord*, *United States v. Von's Grocery Co.*, 233 F. Supp. 976, 981, 985 (S.D. Cal. 1964), *rev'd*, 384 U.S. 270 (1966).

²⁸ 384 U.S. 546 (1966).

²⁹ *Id.* at 552-53.

³⁰ Bell, "The Maturing TV Industry," 30 J. Mktg. 12 (1966). Note that shifts in demand may also affect the number of firms in an industry.

When mergers coincident with a thinning of the ranks arise out of the play of natural forces, a difficult problem arises. How can the court be sure that the forces of indivisibility are operating as rapidly as the merger movement? Is it desirable to allow some firms to merge and achieve economies of scale while preventing others from doing so? A solution to such problems seems so difficult to achieve that possibly all mergers should be blocked and the bankruptcy courts allowed to dispose of the firms which cannot survive alone.

C. *Low Concentration*

One might imagine that, if the existence of concentration were a reason to enjoin a merger, the lack of such concentration would constitute a favorable factor in considering the legality of a joinder of two enterprises. If no group of firms in the industry (the Big X) enjoyed a combined market share of significant size, it would seem to follow that the industry was deconcentrated and, therefore, that merger did not present a hazard to competition.³¹ This hypothesis, however, was tested in *Brown Shoe Co. v. United States*³² where the Supreme Court took the opposite position. There the evidence showed that there were many shoemakers in the industry and that the twenty-four largest manufacturers only produced about thirty-five percent of the national output. But the lack of concentration did not prevent the Court from holding the merger invalid.³³ In so ruling it wrote:

Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon local control of industry and upon small business. Where an industry was composed of numerous independent units, Congress appeared anxious to preserve this structure.³⁴

The Court went on to indicate that the fact of fragmentation in the retail end of the industry was a reason to find the merger invalid despite the low market shares of the participants.

³¹ Distinguish a situation in which the market shares of the party are themselves low.

³² 370 U.S. 294 (1962).

³³ *Id.* at 322, 333.

³⁴ *Id.* at 333. In the same case it was said at 343-4:

The market share which companies may control by merging is one of the most important factors to be considered when determining the probable effects of the combination on effective competition in the relevant market. In an industry as fragmented as shoe retailing, the control of substantial shares of the trade in a city may have important effects on competition. If a merger achieving 5% control were now approved, we might be required to approve future merger efforts by Brown's competitors seeking similar market shares.

From what has been said above, however, it would follow that fragmentation should be just as irrelevant as concentration. In either situation the important question is whether the combined market shares of the merging parties would substantially reduce competition. As we have sought to demonstrate, whether the rest of the industry be concentrated or fragmented makes no difference.

D. *A Trend in Concentration*

We have seen that the courts refer to the existence of concentration as an adverse factor in antimerger litigation. Another question arises as to whether the trend of concentration should be given weight in such cases. In this connection we are speaking of concentration, not of the market shares of the parties to the merger. If the market shares of the parties have been moving either upward or downward, that may cast some light on the structural effects of permitting an acquisition.³⁵ This is different from observing a trend, upward or downward, in the combined share of the Big X companies in the industry.

The cases clearly indicate that an upward trend in concentration is a factor adverse to the validity of a merger. In *Brown Shoe* the Supreme Court in blocking the merger expressly referred to a "trend toward concentration in the industry."³⁶ The statute prohibits a given merger only if the effect of that merger is to lessen competition substantially. The Court asserted, however, that the trend toward concentration is relevant in determining whether the merger will have that prohibited effect.³⁷ Other decisions have echoed this thought. On the other hand, a trend away from concentration seems to be disregarded or treated as of little significance.³⁸

If we are correct in believing that the existence of concentration is irrelevant, it would follow that a trend in that direction is likewise of no concern. In other words, a decline in the combined market share of the Big X firms in a given industry is not a factor which should lead a court to consider a merger valid. If the market shares of the parties to the merger are themselves objectionable, whether the shares

³⁵ *United States v. Aluminum Co. of Am.*, 377 U.S. 271 (1964); *United States v. Continental Oil Co.*, 237 F. Supp. 294 (W.D. Okla. 1964). Cf. *United States v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867, 932, 935 (S.D.N.Y. 1965).

³⁶ *Brown Shoe Co. v. United States*, 370 U.S. 294, 322, 333 (1962).

³⁷ *Id.* at 315, 332; *United States v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867, 950 (S.D.N.Y. 1965). Indeed in *Hanover Trust* there is a suggestion that proof of a trend toward concentration is an essential part of the plaintiff's case. *Id.* at 941.

³⁸ *United States v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867, 948-49 (S.D.N.Y. 1965); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Aluminum Co. of Am.*, 377 U.S. 271 (1964).

of the Big X are increasing or declining should neither save nor hinder the merger. Here again forces of indivisibility may be at work; an industry may be shrinking and concentration increasing because economies of scale are thus achieved. On the other hand, membership in an industry may be increasing solely by reason of the fact that the industry is running along the upward swing of its growth cycle. We deem it hazardous to rely on an analysis of such causal relationships. Furthermore, for the reasons set out, we can find no relevance in the whole concept of concentration.

E. Vertical and Other Mergers

The discussion up to this point has concerned horizontal mergers. We have argued that the existence of concentration is irrelevant in determining the legality of acquiring a competing firm. Similarly, it has been suggested that the existence of a trend toward or away from concentration does not affect the validity of a horizontal merger.

We turn now to other types of mergers. When the parties to an acquisition are related as buyer and seller, their merger is said to be vertical in character. It might be argued that in such a situation the fact of concentration in the market of the acquired firm would make foreclosure more likely. Certainly that would be the case if the merger involved one of the Big X in the acquired firm's industry. That result, however, flows merely from the fact that the acquired firm had a large market share. As in the case of horizontal mergers, nothing is added by demonstrating that the Big X enjoy a large proportion of industry sales.

Take, for example, the acquisition of one of the major three automobile manufacturers by a steel mill. Under the foreclosure doctrine that acquisition would no doubt reduce the opportunity of other steel mills to sell to the acquired automobile manufacturer. The fact of concentration in the automobile industry, however, does not reduce the tonnage which can be moved into automotive markets.

When the merger takes the form of diversification or geographic dispersion, the fact of concentration seems even less relevant. In some recent decisions the FTC has blocked mergers in the nature of geographic dispersion on the ground that the acquiring firm was a potential competitor who was thus removed from the market.³⁹ In other cases such mergers have been barred on the "deep pocket" theory that they would unduly enhance competition in the acquired field.⁴⁰ Neither of those doctrines is related to the existence or lack of concentration.

³⁹ *Foremost Dairies, Inc.*, 60 F.T.C. 944 (1962).

⁴⁰ *Reynolds Metals Co. v. FTC*, 309 F.2d 223 (D.C. Cir. 1962).

Let us illustrate the situation. Suppose the Borden Company, a nationwide dairy firm not otherwise engaged in business in Topeka, Kansas, purchases an existing dairy plant in that city. Does it make a difference whether the dairy business in Topeka is then concentrated in a Big Three or Big Four? If concentration exists, Borden may have bought a plant included in the Big X. The significance of the fact of concentration cannot be assessed in evaluating the impact of that purchase on competition. If the plant is in the Big X group, it presumably is relatively large. That fact, however, is independent of the existence of concentration. If the plant purchased was not part of the Big X, and it is assumed that Borden has ample resources with which to modernize facilities and otherwise compete vigorously, the fact of concentration again seems to have little bearing on the outcome unless one resorts to the doctrine of countervailing power. In that event, of course, the Borden purchase would appear to intensify competition.

Similar considerations are applicable when a merger takes the form of diversification into a new industry or a new product. In both geographic dispersion and diversification it is difficult to find a theory under which injury to competition may be found. Conceivably, impairment of potential competition or some other doctrine may be invoked in attacking such a merger. The existence of concentration or fragmentation, however, in either the acquired or acquiring industry, seems to bear no rational relationship to the purposes of the antimerger laws.⁴¹

V. CONCLUSION

We have examined the role of concentration in antimerger litigation. In many instances, particularly those involving horizontal mergers, courts have deemed the existence of concentration an adverse factor. Oddly enough the lack of concentration has not been considered a favorable factor. While existence of concentration is closely linked to the market shares of the participants to a merger, a subject which is indeed relevant to the resolution of such litigation, it is believed that concentration in and of itself does not bear a rational relationship to the purposes of section 7 of the Clayton Act and allied legislation.

⁴¹ *Contra*, *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

Nothing herein is intended to imply that the concept of concentration is not relevant in proceedings other than antimerger cases. For example, in determining whether a tariff should be raised or reduced it might be highly important.